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MONTANA PROSECUTOR

September/October, 1979 Volume 3, No. 4

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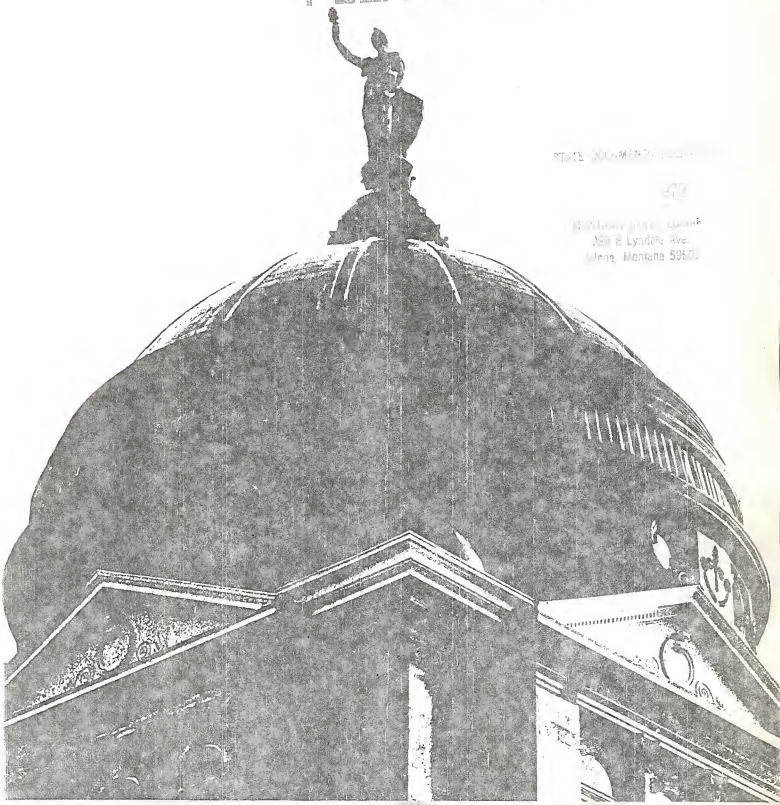

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INTRODUCTORY NOTES

On Leadership

> "No matter how strong the longing for unanimity,.. almost all leaders...must settle for less than universal affection. They must be willing to make enemies - to deny themselves the affection of their adversaries. They must accept conflict. They must be willing and able to be unloved. It is hard to pick one's friends, harder to pick one's enemies."
>
> James McGregor Burns, Leadership, 1978.

Highway Patrol Memo

Colonel Joe R. Sol on October 2, 1979 advised all uniformed Montana Highway Patrol personnel to be cognizant of the exact wording of section 61-8-405, MCA which states that, "Only a psysician or registered nurse acting at the request of a peace officer may withdraw blood for the purpose of determining the alcohol content therein." This memo was distributed in response to a case involving a motorcycle accident in which the female passenger was killed. The driver was taken to a local hospital where a medical technologist drew a blood sample at the request of a peace officer. The test results revealed a blood/alcohol level of .16. The defendant moved to suppress the evidence of the blood alcohol test because the blood was not withdrawn by a physician or registered nurse. The motion was granted and defendant was subsequently found not guilty of the offense of driving under the influence of alcohol.

Mandatory Training of Justices of the Peace and City Judges

Chapter 466, Laws of Montana, 1979 makes it mandatory that all Justices of the Peace and City Judges attend two training sessions per year supervised by the Montana Supreme Court. According to this legislation, failure to attend, unless granted a waiver by the Montana Supreme Court "disqualifies him from office and creates a vacancy in that office." It appears that failure to comply with the provisions of Chapter 466 could potentially cause problems in criminal cases where allegations could be made that a Justice of the Peace or City Judge acted without jurisdiction thereby nullifying his actions. Although application of Chapter 466 may give rise to constitutional questions, nonetheless, some litigation may be avoided by assuring that Justices of the Peace and City Judges comply with its provisions.

County Attorney Roster

Enclosed within this issue is a current roster of Montana County Attorneys. Also enclosed is a list of the officers and board members of the County Attorneys Association.

Out-of-State Training

At the Montana County Attorneys Association convention at Fairmont Hot Springs, July 25-28, 1979 it was decided by the membership that the County Prosecutor Services Bureau would apply for only $2,500.00 for out-of-state training for prosecutors. The remainder of any funds allocated by the Board of Crime Control will be dedicated to in-state training. Additionally, the Association members voted to have applications for out-of-state training approved by the Association's training committee prior to allocation of any funds and to call for a fifty percent (50%) local match on all applications for out-of-state training. The Board of Crime Control will consider the aforementioned grant application for $2,500.00 at its October, 1979 meeting. However, the Board has not received funds for this fiscal year yet due to the failure of Congress to approve the entire federal budget. When funds are available prosecutors will be notified.

In-State Training

A detailed Vehicular Homicide/DWI training seminar will be presented on December 6 and 7, 1979 in Billings, Montana by The Traffic Institute of Northwestern University, sponsored by the Department of Justice with funds secured from the Highway Traffic Safety Division of the Department of Community Affairs. Individual transportation, lodging and meal expenses will be reimbursed to each attendee at State reimbursement rates, which are:

Transportation - $.17 per mile

Lodging (Maximum) Actual cost not to exceed $21.00 per night

Meals:

Breakfast	$ 2.00
Lunch	$ 3.50
Dinner	$ 6.50
Total	$12.00

Reimbursement to each attendee will be limited to two nights lodging at $21.00 per night(maximum), meals for 2.5 days ($30.00 total) and mileage in the amount of $.17 per mile for 300 miles ($51.00). No registration fees will be charged and reimbursement to attendees will be made upon the submission of

a travel expense voucher, which will be supplied to each attendee at the conference, supported with lodging receipts to the Department of Justice, Central Services Division, 303 Roberts, Helena, Montana, 59601. Reservation cards, which are enclosed, must be received by the Ramada Inn by November 21, 1979 in order to assure a room for the conference. Sixty attendee spaces will be reserved for county attorneys and their deputies until November 5, 1979, at which time any remaining attendee spaces will be made available to other law enforcement agencies. As a result, if county attorneys or deputy county attorneys desire to attend this seminar, in order to assure a reservation to attend please notify Karen Ferreira, County Prosecutor Services Bureau, 303 Roberts, Helena, Montana, 59601 (449-3816) by November 5, 1979.

Presentations on the following subjects will be given although the precise schedule of events will be provided at a later date:

Accident Reconstruction
Point of Impact Studies
Qualification and Examination of Experts
Legal Aspects of Scientific Evidence
Constitutional Aspects of Accident Investigation
Legal Aspects of Driving Under the Influence of Alcohol or Drugs

A special session concerning House Bill 877 (Mental Disease or Defect Bill) will be presented at 7:00 p.m. on December 6, 1979 for all interested prosecutors.

Legislation

Bill Spoja, President of MCAA, wishes to advise all county attorneys that matters of legislative interest should be forwarded to Marc Racicot for inclusion in the legislative package that will be presented by MCAA. Clarification of the homicide scheme, the mental disease or defect provision, and sentencing statutues are legislative topics currently being discussed.

RECENT CASES AND NOTES

PROSECUTING ATTORNEY - WITNESS - RECUSATION

"...We hold that when a deputy prosecuting attorney becomes a witness in a case which is being prosecuted by him or another person in the prosecutor's office, the Code of Professional Responsibility does not require a recusation of the entire staff of the prosecutor. We must point out, however, that a prosecuting attorney exercises authority and speaks through his deputies. If the elected prosecutor himself becomes a witness in a case or otherwise is disqualified by reason of having an interest in the outcome, his entire staff of deputies must be recused in order to maintain the integrity of the process of criminal justice." State Ex Rel. Goldsmith v. Super. Ct. of Hancock City, 386 N.E.2d 942, (Ind., 1979).

PROSECUTION ARGUMENT - REFERENCE TO RIGHT OF APPEAL

A new trial on both guilty determination and sentencing phases of a murder prosecution was required where the prosecutor stated in argument at the guilt determination phase that, "Now you know, if you do err in this case he (defendant) has the right of appeal. The State doesn't have that. The State has no right of appeal from a case like this." The Court stated: "...the overriding vice in this portion of the district attorney's argument is that he effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper thereby causing the jury to believe that the Supreme Court would share with them a burden and responsibility which was in fact their sole reponsibility." State v. Jones, 251 S.E.2d 425, (N.C., 1979).

SEARCH WARRANTS - PROBABLE CAUSE - NEUTRAL AND DETACHED MAGISTRATE

A search was held to violate the Fourth Amendment where the judge who issued a search warrant accompanied the police on the search, and moved about the premises while the search was being conducted, observing the procedures and the items being seized, conversing with the police officers as well as the defendant, and remaining on the scene for approximately one and one half hours until the search was completed, and the judge then prepared arrest warrants for the defendants. On these facts, including indications that this was not an isolated incident but part of an on-going practice, it could not be found that the magistrate was neutral and detached within the purview of the Fourth Amendment. In fact, the Court was of the view that the judge had "thrown in" with the police and become a part of their law enforcement activity. Thomason v. State, 251 S.E.2d 598, (Ga.App. 1978).

SEARCH INCIDENT TO ARREST - SCOPE

Where the defendant was arrested on the front porch of his house for robbery, a warrantless search of the back part of the house could not be justified as part of a search incident to arrest and the admission of evidence of the robbery seized in such search required that this conviction be reversed. Taylor v. Commonwealth, 577 S.W.2d 46, (Ky., 1979).

WARRANTLESS SEARCH - EXIGENCY - UNITED STATES v. CHADWICK RETROACTIVITY

In United States v. Chadwick, 433 U.S. 1 (1977), the United States Supreme Court held that in the absence of some exigency requiring an immediate luggage search, a warrant must be obtained before law enforcement officers can search luggage which they have seized from a vehicle, even though officers have probable cause to believe that the luggage contained contraband. United States v. Stewart, 591 F.2d 63, (9th Cir., 1979).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - THIRD FLOOR OF APARTMENT BUILDING - USE OF STARTRON

A warrantless surveillance by police officers of a third floor apartment, conducted from a third floor of a building forty to fifty feet away, did not violate the defendant's Fourth Amendment rights, even though he had contended that his third floor location entitled him to a greater expectation of privacy from observation. The Court rejected this contention because the susceptibility of defendant's third floor apartment to observation from the location used by the police was readily apparent. The use of a "startron" by the police, in conducting the surveillance, did not change the result. A "startron" is a devise which enables the observor to see into areas which would appear dark to the naked eye or through conventional binoculars. Commonwealth v. Williams, 396 A.2d 1286, (Pa.App., 1978).

SEARCH WARRANTS - PARTICULARITY OF DESCRIPTION OF ITEMS TO BE SEIZED - FABRIC - GENERAL WARRANTS

A search warrant for "articles of clothing, floor covering upholstery fabric and blankets made of woollike fibers and traces of such fibers" was held not to be a general warrant in People v. Lindholm, 591 P.2d 1032, (Colo., 1979). "The only items which could be seized were those articles of clothing, floor covering, upholstery fabric, and blankets containing red woollike fibers. Accordingly, the search warrant was not a general warrant." The Court noted that in determining whether a warrant is vague or too general in its description of the items to be seized, the nature of the property must be considered.

SEARCH WARRANTS - EXECUTION - SPECIFICITY OF PROPERTY TO BE SEARCHED

A search warrant which omitted the city and the county of the premises to be searched was not invalid where it was demonstrated that there was no confusion on the part of the police officers as to the exact address where the warrant was to be executed, there was no possibility of error, there was no room for discretion, the complaint for the warrant was bought by a Chicago police officer, his affidavit related that he had spoken to an informer about an illegal sale of heroin within the city, a Cook County judge issued the warrant based upon information in the affidavit, the warrant was executed by Chicago police officers at the address in the city, and it was clear that the officers went directly to the stated address in the city of Chicago and executed the warrant. "Our examination of the case law persuades us that no hard and fast rule is to be applied to every search warrant which omits the city and county involved. Rather, the determination to be made is whether in view of all of the relevant facts that omission operated to cause any ambiguity or confusion." Bearing on this question, however, was the fact that under State law police officers could execute search warrant anywhere in the State, not just within their own jurisdiction. "Clearly, the effect of this is to negate any presumption that a warrant issued in Chicago at the request of Chicago police, must have been intended for use in the city. But these factors still may be taken into account, in conjunction with other facts, in determining whether there was a reasonable possibility of confusion or even discretion in executing this warrant." An examination of the facts in light of the case law persuaded the Court that there was no confusion, possibility of error, or room for discretion in determining where the warrant was to be served. People v. Frangoso, 386 N.E.2d 409, (Ill.App., 1979).

RIGHT TO PRIVACY - REASONABLE EXPECTATION - USE OF OPTICAL AIDS

It has been held that where activities seen through a police officer's ten-power binoculars within a suite in an office building would not be observable to anyone not using an optical aid, and such activity was protected from the uninvited eye, the view of such activities by the police was violative of the Fourth Amendment. The Court offered these rules in connection with determining the privacy issue where optical aids are utilized by police officers. "We conclude: (1) the use of optical aids in the nature of binoculars, telescopes and the like is not in itself determiniative of the admissibility in evidence of the product of the observation; (2) the primary determinative factor is the presence or absence of a reasonable expectation of privacy of the person whose conduct, property or documents is observed; (3) reasonable expectation of privacy in the context here involved is tested by the extent to which the person has exposed his conduct, property or documents to public view by the naked eye; (4) if the purpose of the optically aided view is to permit clandestine police surveillance of that which could be seen from a more obvious

vantage point without the optical aid, there is no unconstitutional intrusion; and (5) if the purpose of the optical aid is to view that which could not be seen without it, there is." The Court did however, recognize that special circumstances involving a high degree of danger to life or property may permit an optically aided view, and that there may be situations in which probable cause may be established to the satisfaction of a magistrate so that the aided view may be authorized by a warrant. The Court, however, did not reach these issues on the facts of this case. People v. Arno, 153 Cal.Rptr. 624,(Cal.App., 1979.)

MIRANDA - CUSTODY - HOME

Defendant was not in custody within the purview of Miranda where he was questioned at his house. He was not under arrest nor was there evidence that his freedom of action was restricted in any significant way. United States v. Scott, 590 F.2d 531, (3rd Cir., 1979).

MIRANDA - CUSTODY - POLICE STATION

In this case the Court rejected a trial court conclusion that merely because a defendant crossed the threshold of a police station his situation was automatically converted into a custodial one within the contemplation of Miranda. It appeared that the police had no reason to suspect the defendant of any involvement in the crime under investigation, defendant was not in fact under arrest and his freedom of action was not being significantly restricted in any way. "We therefore do not see how, without more, defendant's act of crossing the threshold of the police station would have converted a non-custodial situation into a custodial one within the contemplation of Miranda...We conclude that the trial judge was in error in ruling as he did." State v. Lutz, 398 A.2d 115, (N.J.App., 1979).

MIRANDA - CUSTODY - DETOXIFICATION CENTER

Where defendant was removed from his estranged wife's house and taken to a detoxification center at a hospital, he was deprived of his freedom of action in a significant way and therefore was "in custody" for purposes of the Miranda rule. State v. Sickels, 275 N.W.2d 809, (MMinn., 1979).

MIRANDA - ADEQUACY OF WARNING - RIGHT TO COUNSEL

Where defendant was advised by the police, "We have no way of giving you a lawyer, but one will be appointed for you if you wish, if and when you go to court," this was an inadequate statement of his right to counsel. Such statement was equivocal, suggesting on the one hand that defendant's constiutional right to counsel was triggered only if he went to court, while, on the other hand, he was told that he had a right to an attorney during his police interrogation. Commonwealth v. Johnson, 399 A.2d 111, (Pa., 1979).

MIRANDA - CUSTODY - LIE DETECTOR TEST

Where the evidence indicated that it was a police officer's custom to tell criminal suspects that they were under no obligation to take a lie detector test, and defendant signed a form consenting to the test, and defendant thought he had to take the test, and the police gave defendant his Miranda warnings before questioning him on two occasions, a trial court's determination that defendant was not in custody at the time of the lie detector test was approved and statements which he made immediately following the test were ruled admissible, notwithstanding the absence of Miranda warnings immediately preceding the test. The Court, however, noted a preferred procedure: "We, however, are mindful of difficult questions arising as to the voluntariness of statements made by a suspect while or immediatley after taking a lie detector test at the request of the police, and we are concerned that suspects receive adequate warnings before taking these tests. We also believe that a considerable amount of litigation and the necessity of ruling some confessions inadmissible may be avoided if the police give warnings in all cases before administering polygraph tests. We think that good practice dictates that police specifically inform suspects of their rights 'to refuse to take the [lie detector] test, to discontinue it at any point, and to decline to answer any individual questions.' We also take this occasion to recommend to the police that full Miranda warnings be given in any case where it is doubtful whether the suspect taking the lie detector test is in custody." Hunter v. State, 590 P.2d 888, (Alaska, 1979).

MIRANDA - WAIVER - NON-VERBAL AFFIRMATIVE RESPONSE

Although the better practice is to obtain written evidence that a defendant has waived his constitutional rights during police interrogation, a wavier of the right to counsel and to remain silent can be accomplished by a non-verbal affirmative response consisting of the defendant's nodding of his head up and down. People v. Ferran, 591 P.2d 1013, (Colo., 1978).

MASSIAH - DEFENDANT'S DECEPTION

"Maryland has not adopted the minority view, the so-called per se rule, which mandates exclusion of all statements given by an accused after defense counsel has been engaged unless counsel has been advised of the State's intention to take a statement and has been given an opportunity to be present...Thus there is no basis for appellant's apparent contention that his May 31 statement was admitted improperly because defense counsel was not present. Indeed, we consider it manifest that his contention would be unsupported even under the minority view because his retainer of counsel was unknown to his interrogators and he himself withheld it." Ellerba v. State, 398 A.2d 1250, (Md.App., 1979).

MIRANDA - APPLICABILITY TO CIVIL CASES - SUBSEQUENT PROSECUTION

Uncounselled inculpatory testimony given in a civil case in ignorance of the Fifth Amendment privilege against self-incrimination was not thereby inadmissible in a subsequent criminal case. The Court rejected an argument that could be construed to advocate Miranda-like warnings in such circumstances. "In the absence of special circumstances of custodial interrogation, the cost of such a prophylactic outweighs its utility. Moreover, a failure to inform [defendant] of his Fifth Amendment privilege in the civil contest does not make the testimony given in the civil case involuntary.... [Defendant] in fact admitted that he wanted to testify in order to rebut [a witness's] allegations [in the civil case]. He also was aware that an indictment was pending at the time of the civil trial, and he does not contend that he did not know that the testimony could be used against him in the criminal trial. Finally there is no indication that [defendant] was in any way compelled to take the stand. Admission of testimony given under these circumstances is not violative of due process." U.S. v. White, 589 F.2d 1283, (5th Cir., 1979).

MASSIAH - QUESTIONING BY CELLMATE

In a classic Massiah application, the Fourth Circuit Court of Appeals in Henry v. United States, 590 F.2d 544, (4th Cir., 1978), ruled that the defendant's right to counsel was violated when the Government introduced incriminating statements made by him to a cellmate, who was a paid Government informant, and the statements were made after the defendant's indictment, while he was obviously in custody, and in the absence of counsel. There was some question in this case about whether the defendant was "interrogated" in the traditional sense by the cellmate, but the Court rejected a Government argument that Brewer v. Williams, 430 U.S. 387 (1977) had limited Massiah to cases in which the Government has directly questioned the accused about his participation in the crime. "In the instant case, even if we assume that [the cellmate] obeyed his instructions not to interrogate [defendant] about the bank robbery, [the cellmate] did testify that he engaged in conversation with [the defendant]. If, by association, by general conversation, or both, [defendant] developed sufficient confidence in [the cellmate] that [defendant] bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of Brewer.

BURGLARY - UNAUTHORIZED ENTRY - DEFENDANT'S HAND AND ARM

Where the defendant went to the front door of a house, knocked on the door, and struck the resident in the forehead when he answered the door, and the defendant's hand and arm were in the house when he struck the resident, he could be found guilty of burglary. "It is well established that the unqualified use of the word 'enter' in a burglary statute does not confine its applicability to intrusion of the whole body but includes insertion of any part of the body or of an instrument designed to effect the contemplated crime." State v. Spearman, 366 So.2d 775, (Fla.App., 1978).

WEAPONS - OFFENSIVE WEAPON - DOG

Where a juvenile repeatedly called upon his dog "sic' im, sic'im" in reference to another person, and the dog showed his teeth, growled, snarled and came at the person, the dog was an "offensive weapon" within the purview of a statute (N.J.S.A. 2 A:90-3) and in this case there was sufficient credible evidence in the record to uphold a finding that the juvenile had committed an assault with the weapon. "The judge properly found that he unlawfully directed force toward another person under circumstances which created a well-founded fear of imminent peril and that there was an apparent ability to consummate the attempt." State In Interest of J.R., 398 A.2d 150, (N.J.App., 1979).

NARCOTICS - CONSTRUCTIVE POSSESSION

Knowledge and constructive possession of narcotics found in a motel room jointly possessed by the defendant was ruled out in Falin v. State, 367 So.2d 675, where the defendant was in a police station miles away at the time the contraband was seized, there was no direct proof as to when he had last been in the room or whether the narcotics had even been present at the same time he was, and no evidence that he knew about or had the ability to control the narcotics. "In sum, there is no evidence in the record which eliminates the perfectly reasonable hypothesis of innocence that the drugs and implements came into the room without [defendant's] knowledge and, indeed, after he had already left."

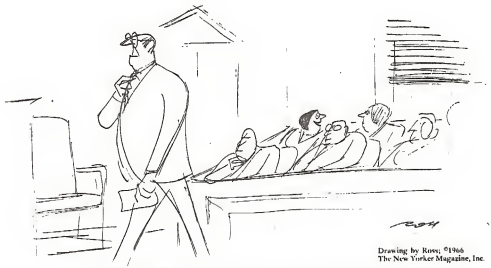
ENTRAPMENT - AGENCY - INTENT

"...Manipulation of a third party by law enforcment officers to procure the commission of a criminal offense by another renders the third party a government agent for purposes of the entrapment defense, even though the third party remains unaware of the law enforcement object." (Emphasis suppied). People v. McIntire, 591 P.2d 527, (Cal., 1979).

HARMLESS ERROR RULE - ERRONEOUS INSTRUCTION

The doctrine of harmless constitutional error could not be applied to cure a constitutionally impermissible instruction which told the jury it could accept a presumption as proof beyond a reasonable doubt of any material element of the crime charged, or which required the defendant either to introduce evidence to rebut the presumption or to carry the burden of proving the contrary. "Obviously, an instructional error which unconstitutionally shifts the burden of proof of an essential element of the crime to the defendant, causing a serious question about the accuracy of the guilty verdict, is not an error that did not contribute to the guilty verdict." Angel v. Mohn, 253 S.E.2d 63, (W.Va., 1979).

The same Court rules that under the doctrine of harmless constitutional error, the giving of an instruction in a murder case which stated that malice could be presumed from the use of a deadly weapon, would not alone be sufficient to reverse a conviction for involuntary manslaughter, since the mere presence of the constitutionally defective instruction was not related to the actual verdict and could be deemed, in the absence of other factors, to have an insubstantial or unimportant effect on the verdict, and therefore could be harmless beyond a reasonable doubt. "We know of no case where a court that applied the Mullaney v. Wilbus, 421 U.S. 684, (1975), principle to overturn a conviction of a lesser crime than murder on the theory that the unconstitutional instruction, shifting from the state the burden of proving lack of provocation for murder renders such verdict defective." State v. Kirtley, 252 S.E.2d 274, (W.Va., 1978).



Drawing by Rose; ©1966 The New Yorker Magazine, Inc.

"I enjoyed that. He was very, very illogical."

DOUBLE JEOPARDY - FAILURE OF DEFENDANT TO PERFORM ON PLEA BARGAIN

"We hold, therefore, that the double jeopardy clause does not bar the prosecution of an accused who willfully refuses to perform a condition of a guilty plea which has been accepted by the trial court on that basis. Further, in light of our colloquy with counsel during oral argument, we now hold that the state was not barred from bringing the second prosecution on the original charge of first degree murder, despite the fact that the vacated plea had been for a lesser degree of criminality." Brown v. State, 367 So.2d 616, (Fla., 1979).

DOUBLE JEOPARDY - DRIVING WHILE INTOXICATED

Where the defendant was apprehended and charged with driving under the influence in town B in the early morning after he had been arrested and charged earlier the same night in town A for the same offense, the interruption of the journey by the first arrest would prevent his driving of a vehicle from being regarded legally as a single, unitary, continuous offense, and therefore he could be convicted as a second offender in violation of the drunk driving statute. State v. Metcalf, 398 A.2d 1320, (N.J.App., 1979).

COLLATERAL ESTOPPEL - PRIOR CRIMES - ACQUITTALS

Evidence of a defendant's participation in prior crimes was inadmissible under the doctrine of collateral estoppel where he had been acquitted of those charges, but such evidence was admissible in a subsequent trial against a co-defendant. "The collateral estoppel doctrine applies to subsequent proceedings between the same parties, and that requirement is not met with respect to the evidence against [the defendant] in the trial of [the co-defendant]." United States v. Day, 591 F.2d 861, (D.C., 1979).

DEFENSE OF PROPERTY - RETAKING OF GAMBLING LOSSES

The affirmative effect of justifiable use of force in defense of property was ruled inapplicable in an armed robbery case against a defendant who forcibly retook his gambling losses from a pool "hustler". "This affirmative defence is clearly available only when the defendant is lawfully in possession of the property. Here, the victim [pool hustler] was in possession and the defense is simply inapplicable." People v. Robinson, 386 N.E.2d 165 (Ill.App., 1979).

DISCOVERY - RECIPROCAL REQUIREMENT - WARDIUS V. OREGON - CONSTITUTIONALITY

In Wardius v. Oregon, 412 U.S. 470 (1973) the United States Supreme Court ruled unconstitutional alibi disclosure statutes which do not impose reciprocal duties on the prosecution with respect to intended rebuttal witnesses. In the instant case Wardius was ruled retroactive. Jackson v. Fogg, 465 F.Supp. 177, (N.Y., 1978).

DISCOVERY - BREATHALYZER TESTS - BREATH SAMPLES

The Supreme Court of Colorado has held that the State is under obligation to collect and preserve breath samples in connection with breathalyzer tests at the time that the tests are administered, so that they can be obtained and utilized by the defendant on discovery. The Court reached this conclusion in view of evidence that breath samples can be preserved inexpensively and expediently and that separate breath samples could be independently tested and the results of such tests used to "impeach" the "testimony" of the devices which tested the defendant's breath. Where the State failed to preserve such samples, the evidence relating to the breath test and any derivative evidence was ordered suppressed. Garcia v. District Court, 589 P.2d 924, (Colo., 1979).

DISCLOSURE - EXCULPATORY EVIDENCE - IDENTIFICATION OF OTHER PERSON

It was reversible error in a murder prosecution for the prosecutor to fail to disclose exculpatory evidence relating to a witness's photographic identification of persons other than the defendant, whether this failure to disclose was deliberate or unintentional. State v. Galloway, 275 N.W.2d 736, (Iowa, 1979).

WITNESS - CROSS-EXAMINATION - BIAS

Where a prosecution witness was the only witness whose testimony implicated the defendant on all six charges facing him, and the jury was unaware that the witness testified with a limited grant of immunity, it was reversible error for the trial court to restrict the defendant's cross-examination of the witness for bias. This restriction deprived the defendant of his constitutionally protected right to a fair trial. Wintjen v. State, 398 A.2d 789, (Del., 1979).

DISCLOSURE - ARRANGEMENTS MADE WITH PROSECUTION WITNESS

The Supreme Court of Indiana has taken the position that it is the "better practice" for a prosecutor to unequivocally state to the jury the entire nature and extent, if any, of the State's dealings with its witnesses, even though its failure to do so might not be reversible error. "It is, of course, better practice for the prosecutor to unequivocally state to the jury the entire nature and extent, if any, of the state's dealings with its witnesses...However, we cannot say that its failure to do so in this case was error, both because [the state's witness's] testimony about the arrangement was not demonstratively perjurious, and because the present trial occurred prior to the decision of Giglio v. United States, (1972) 405 U.S. 150..., which heightens the affirmative duty of the prosecutor in completely disclosing all deals." Gordy v. State, 385 N.E.2d 1145, (Ind., 1979).

DISCLOSURE - CORRESPONDENCE BETWEEN PROSECUTOR AND PAROLE BOARD CONCERNING PROSECUTION WITNESS

Defendant was denied a fair trial when his attorney's request was refused for the production of correspondence between the district attorney's office and a parole board advising of the cooperation of a principal prosecution witness and expressing the hope that such cooperation would be taken into account when the witness was considered for parole. "The material sought by defense counsel here -- correspondence between the office of the District Attorney and the Parole Board relating to the witness...were of such a nature that the jury could have found that, despite the witness's protestations to the contrary there was indeed a tacit understanding between the witness and the prosecution...Consequently, in view of the significance which the jury might have attached to this evidence and in keeping with the principles enunciated in Brady v. Maryland, 373 U.S. 83..., supra and its progeny, we hold that the nondisclosure of this evidence denied defendant his right to a fair trial". People v. Cwikla, 386 N.E.2d 1070, (N.Y., 1979).

THE GUILTY PLEA - WITHDRAWAL - WITHHOLDING FACTS FROM COUNSEL AND COURT

A guilty plea cannot be withdrawn as a matter of right merely because the defendant withheld facts from his attorney and the trial court which, if believed, might have prevented the attorney from recommending that the plea be entered or the court from accepting it. State v. Miller, 275 N.W.2d 614, (Neb., 1979).

DEFENDANT AS WITNESS - TRYING ON SHOE

In a burglary and theft prosecution, it was reversible error for the trial court to prevent the defendant from trying on a shoe, which the State had placed in evidence, and requiring the defendant to be sworn as a witness, thereby waiving his Fifth Amendment privilege before he would be permitted to try on the shoe. "It is clear that if the state had desired, it could have compelled the defendant to try on the shoe without being sworn and waiving the privilege of the Fifth Amendment. It is only fair that when the defendant desired to try on the shoe he should have been permitted to do so without being sworn and waiving the privilege of the Fifth Amendment." State v. Norris, 577 S.W.2d 941, (Mo.App., 1979).

DEFENDANT AS WITNESS - CHARACTER EVIDENCE - HOMOSEXUALITY

"It was not improper for the judge to admit evidence relative to the [homosexual] relationship which existed between the defendant and the deceased [in a murder prosecution], however we are not at all sure but that the evidence allowed, together with the argument of counsel to the jury, tended to try the defendant for being a homosexual. It is common knowledge that a substantial portion of the populace, and presumably a substantial portion of the jurors, look with disdain upon homosexuals. When pursued for any purpose other than to prove or disprove some fact in issue, evidence of a homosexual relationship tends to become an attack upon the character of the defendant. Upon remand and at a new trial, the judge should be meticulous to see that such evidence and argument, if presented, is kept in bounds and used only for relevant and proper purposes." State v. Hartfield, 252 S.E.2d 139, (S.C., 1979).

INSTRUCTIONS - DEADLOCKED JURY - MINI-ALLEN CHARGE

A mini-Allen charge to a deadlocked jury which included the statement "If you fail to agree upon a verdict, the case will be tried before another jury", and which implicitly referred to the expense involved in trying the case, thus creating an additional pressure for the jury to reach a verdict, was ruled prejudicial error necessitating reversal of a conviction in People v. Barraza, 591 P.2d 947, (Cal., 1979).

MENTAL HEALTH - INVOLUNTARY MENTAL PATIENT - REFUSAL TO TAKE MEDICATION - DUE PROCESS

The United States District Court for New Jersey has ruled that an involuntary mental patient has the right to refuse medication in the absence of an emergency, such right being based upon the fundamental constitutional right of privacy. In the absence of an emergency, therefore, a due process hearing would be required in order to force the administration of drugs upon such a patient. Rennie v. Klein, 462 F.Supp. 1131, (N.J., 1978).

PROBATION - CONDITIONS - REASONABLENESS - POLYGRAPH TEST - WARRANTLESS SEARCHES

A condition of probation requiring defendants convicted of possessing more than one ounce of marijuana to submit to polygraph tests at the request of a probation officer was held not violative of their Fifth Amendment rights. However, a requirement that they submit to such test at the request of the district attorney was ruled improper. Another condition requiring the defendant to submit to a warrantless search was ruled permissible so long as the search was under the direction and control of the probation officer. State v. Age, 590 P.2d 759, (Ore.App., 1979).

RECIDIVISM STUDY

A recent study funded by the Law Enforcement Assistance Administration indicated that the likelihood of an arrested person committing another crime can be determined with some accuracy. The study, entitled "The Scope and Prediction of Recidivism," was conducted by the Institute of Law and Social Research based on data obtained from the Prosecutor's Management Information System (PROMIS). The study indicated that persons with prior records who were arrested for larceny had a 60 percent likelihood of being rearrested. Persons arrested for larceny who had no prior record had a 24 percent chance of being arrested again.

Individuals who had a prior record and were charged with misdemeanor drug offenses were rearrested at a rate of 56 percent. The chance of rearrest in such cases dropped to 19 percent with individuals who had no prior record. The study suggested that prosecutors might consider these indicators of recidivism as criteria for selecting career criminal prosecution defendants who might otherwise not come under scrutiny.

The sample used for the study consisted of data on 4,703 adults arrested for serious misdemeanors or felonies in Washington, D.C. from January 1, 1971 to August 31, 1975. To obtain copies of the study, call 202-862-2900, or send an interlibrary loan form to Document Loan Program, National Criminal Justice Reference Service, Box 600, Rockville, Maryland 20850.

LIMITATIONS ON THE EXCLUSIONARY RULE

Senator DeConcini (D-N.M.) has redrafted a bill introduced by Senator Bentsen (D-Tex.) in the 93rd Congress which would place certain limitations on the applicability of the exclusionary rule in criminal proceedings. Judges would have greater discretion to admit proffered evidence which was acquired as a result of an illegal search or seizure. The DeConcini bill is being prepared and currently seeking sponsors.

The proposed bill would require courts to make a determination as to whether the illegal search or seizure was intentional or substantial. Various factors are evaluated in the determination of whether a violation is substantial under the bill, including the reasonableness of deviation from sanctioned conduct, the extent to which the violations was reckless, the extent to which privacy was invaded, the extent to which exclusion will tend to prevent such violations and whether, but for the violation, the evidence seized would have been discovered. If a Fourth Amendment violation is found to be neither intentional nor substantial, then the evidence would not be excluded.

ARGUMENT

Arguments that defendant kept silent because of his right to do so and that defendant kept his mouth shut (to hide a gold tooth the victim described) did not shift the burden of proof, because it is permissible to argue defendant's failure to produce evidence when he takes the stand and testifies. Even if the comments were error, they were waived by defendant's failure to object. State v. Newman (Ariz.) 595 P.2d 665.

ARREST - SEX

Police, acting on information supplied by witness to a robbery, had probable cause to arrest defendant although the witness had described her as a man. She was arrested in a car matching the witness's description, her hair style and size matched, and the officers also saw her in possession of food stamps which had been taken in the robbery. Burns v. State (Ind.) 387 N.E.2d 442.

ARGUMENT

Arguing that defendant could have called his wife to corroborate his story that the weapons were in her purse was reversible error. The evidence was conflicting, and the defendant claimed that the wife committed the offense while the husband was passed out. So the wife was actually unavailable. Schrameck v. State (Okl. Cr.) 595 P.2d 799.

COMPUTER EVIDENCE - PRIOR BAD ACTS

Evidence that defendant had written 18 bad checks prior to the closing of the account and 28 bad checks after the account was closed was properly admitted to rebut the defense that defendant had "accidentally" picked up the wrong checkbook. The case also sets out the Washington requirements to make computer evidence admissible and states that it is unnecessary to provide technical information about how the bank's computers operated before admitting the evidence. State v. Kane (Wash.App.) 594 P.2d 1357.

CONSPIRACY

Where large amounts of narcotics are being distributed the major buyers may be presumed to know that others are involved and are necessary to the success of the venture. In this case, there was sufficient evidence of a common design to acquire and distribute various narcotic drugs. Whether there was a single conspiracy was a jury question. (The majority opinion isn't that startling, but a good dissent makes it more useful.) United States v. Watson (10th Cir.) 594 F.2d 1330.

DOUBLE JEOPARDY

Double jeopardy does not attach when a mistrial is declared, over defendant's objection, because the trial judge becomes seriously ill (hospitalized for more than one day) or dies. State v. Cole (Or.) 595 P.2d 466.

The imposition of prison disciplinary proceedings and a prosecution for escape did not violate double jeopardy, because the administrative disciplinary proceedings were not sufficiently analogous to the criminal proceedings. State v. Kjeldahl (Minn.) 278 N.W.2d 58.

DEFENSE COUNSEL - DISQUALIFICATION

The disqualification of a defense attorney who was intimately involved with the family of a prosecution witness and who had represented the witness was proper. People v. Hall (N.Y.) 387 N.E.2d 610.

DRUGS AND NARCOTICS

Evidence that defendant had a large amount of money, coupled with other evidence of drug dealing, was admissible to prove that defendant possessed the heroin found in his house. State v. Smith (Or.App.) 594 P.2d 860.

IDENTIFICATION

When defendant drastically altered his appearance for trial after the sole eyewitness had identified him in a photo lineup, the court admitted an arrest picture of defendant to show his changed appearance. It was not error that the picture had a police identification number on it. Richardson v. State (Ind.) 388 N.E.2d 488.

INDICTMENT - CHILD MOLESTING

When a male defendant is charged with molesting two male children, the State is not required to allege in the indictment that the victims were not defendant's spouse. Jacquez v. State (Tex. Crim. App.) 579 S.W.2d 247.

INFORMANTS

Defendant's due process rights were not violated by payment of a government informant on a contingent basis, citing a Ninth Circuit case. United States v. Hodge (7th Cir.) 594 F.2d 1163.

INSTRUCTION - WITNESSES

Defendant failed to call two witnesses on his behalf at his trial, and the missing witnesses could have given material testimony regarding a motive behind defendant's presence in a high-drug area. A jury instruction (verbatim in opinion), that the jury was entitled to infer the witnesses' testimony would have been adverse to defendant's case, was proper. Finnegan v. United States (D.C.) 399 A.2d 570.

INSTRUCTIONS - WITNESSES

Defendant was not entitled to an instruction that failure of the State to call witnesses presumably favorable to itself creates the presumption that the witnesses would have hurt the State's case, since the defendant knew of the witnesses and could have called them as his own witnesses. Smith v. State (Ind.) 388 N.E.2d 484.

JURY - DEATH PENALTY

It was not error for the court to sustain the prosecution's challenge for cause of prospective jurors who stated that they might not be able to vote for a first degree murder verdict because it carried a mandatory life sentence. Commonwealth v. Johnson (Pa.) 400 A.2d 583.

MIRANDA - SEARCH AND SEIZURE

A voluntary consent to search was not invalid because defendant had previously invoked Miranda. Consent to search doesn't involve the Fifth Amendment, and his consent to search his apartment was not a "critical state" where defendant had a right to counsel. People v. Phillips (Colo.) 594 P.2d 1053.

NAME - ALIAS

Defendant who gave a phony name when arrested for theft was properly questioned at trial to clarify his true identity. Questions were not prejudicial since no suggestion was made to the jury that he had used a phony name because he was a criminal. People v. Berlin (Ill.) 388 N.E.2d 412.

PRIOR BAD ACTS

Allowing admission of 15 similar robberies to prove defendant's identity under Fed. Rule 404 (b) was not error. United States v. Danzey (2nd Cir.) 594 F.2d 905.

SEARCH AND SEIZURE

Citing the growth of private security forces and the threat to privacy that they pose, the California Supreme Court suppressed heroin found when the private security guards exceeded the scope of their authority and searched a shoplifter for contraband. People v. Zelinski (Cal.) 594 P.2d 1000.

A search warrant to inspect defendant's home "'for evidence of the crimes of child abuse and/or failure to send and maintain child at school'" was a correct response to a report that defendant's child hadn't been at school for 18 days, and that the child had been visibly battered the last day the child was in school. State v. Massey (Or.App.) 594 P.2d 1274.

SENTENCE

In sentencing, a court could properly consider a conviction set aside because of an illegal search and a charge dismissed after a successful motion to suppress. State v. Swartz (Iowa) 278 N.W.2d 22.

SEARCH AND SEIZURE

Terry Powledge, the airline employee who has uncovered 30 packages of drugs in approximately two years, strikes again, and the legality of his initial search is upheld even though Mr. Powledge's purpose was to aid law enforcement. The case reaffirms the holding that officers who take lawful custody of contraband in transit do not need a search warrant to reassert control over the contraband when it reaches its destination, if certain conditions are met. McConnell v. State (Alaska) 595 P.2d 147.

SODOMY

The New Jersey Superior Court holds that nonforcible sodomy between consenting adults is protected by the right of privacy. State v. Hill (N.J. Super) 399 A.2d 667.

STOP AND FRISK

Defendant was frisked twice by different officers after his companion was arrested for possession of a firearm, and a gun was uncovered during the second frisk. The frisks were justified by the companion's arrest and the defendant's demeanor. The court held that the justification for the frisk is not limited to the first officer to deal with the suspect, since the frisk is based on protecting the officer, and an officer subsequently coming in contact with the suspect is entitled to take protective measures for his own safety. Lewis v. United States (D.C.) 399 A.2d 559.

THREATS

The trial judge did not abuse his discretion in admitting defendant's threats against his ex-girlfriend and her child, because the ex-girlfriend turned State's evidence. Although the ex-girlfriend was unaware of the threats, the evidence was relevant to show defendant's consciousness of guilt. Abram v. State (Nev.) 594 P.2d 1143.

HOW ARE YOU PLANNING MY DEFENSE?
I PLAN TO PLAY ON THE EMPATHY OF THE JURY
..AND WHO AMONG YOU WOULD NOT HAVE ACTED THE SAME AS MY CLIENT?
YOU'RE IN BIG TROUBLE

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Montana County Attorneys Association

MR. W. G. GILBERT
County Attorney
Beaverhead County
Dillon, MT 59725

MR. JAMES D. SEYKORA
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Big Horn County
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County Attorney
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County Attorney
Daniels County
Scobey, MT 59263

MR. RICHARD A. SIMONTON
County Attorney
Dawson County
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County Attorney
Deer Lodge County
Anaconda, MT 59711

MR. DENZIL R. YOUNG
County Attorney
Fallon County
Baker, MT 59313

MR. W. A. SPOJA, JR.
County Attorney
Fergus County
Lewistown, MT 59457

MR. TED LYMPUS
County Attorney
Flathead County
Kalispell, MT 59901

MR. DONALD WHITE
County Attorney
Gallatin County
Bozeman, MT 59715

MR. NICK MURNION
County Attorney
Garfield County
Jordon, MT 59337

MR. JIM NELSON
County Attorney
Glacier County
Cut Bank, MT 59427

MR. ROY RODEGHIERO
County Attorney
Golden Valley County
Ryegate, MT 59047

MR. J. ALLEN BRADSHAW
County Attorney
Granite County
Philipsburg, MT 59858

MR. RONALD SMITH
County Attorney
Hill County
Havre, MT 59501

MR. PAT FLAHERTY
County Attorney
Jefferson County
Boulder, MT 59632

MR. JOHN CHRISTIANSON
County Attorney
Judith Basin County
Stanford, MT 59479

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County Attorney
Lake County
Polson, MT 59860

MR. CHARLES GRAVELEY
County Attorney
Lewis & Clark County
Helena, MT 59601

MR. HUGH BROWN
County Attorney
Liberty County
Chester, MT 59522

MR. WILLIAM DOUGLAS
County Attorney
Lincoln County
Libby, MT 59923

MR. R. T. HOOVER
County Attorney
McCone County
Circle, MT 59215

MR. CHESTER JONES
County Attorney
Madison County
Virginia City, MT 59755

MR. JOHN POTTER, JR.
County Attorney
Meagher County
White Sulphur Springs, MT 59645

MR. SHAWN DONOVAN
County Attorney
Mineral County
Superior, MT 59872

MR. R. L. DESCHAMPS
County Attorney
Missoula County
Missoula, MT 59801

MR. JOHN L. PRATT
County Attorney
Musselshell County
Roundup, MT 59072

MR. BRUCE BECKER
County Attorney
Park County
Livingston, MT 59047

MR. LEONARD McKINNEY
County Attorney
Petroleum County
Winnet, MT 59087

MR. WILLIS McKEON
County Attorney
Phillips County
Malta, MT 59538

MR. DOUGLAS ANDERSON
County Attorney
Pondera County
Conrad, MT 59425

MR. ROBERT BROOKS
County Attorney
Powder River County
Broadus, MT 59317

MR. TED MIZNER
County Attorney
Powell County
Deer Lodge, MT 59722

MR. JOHN R. PRATER
County Attorney
Prairie County
Terry, MT 59349

MR. DOUG HARKIN
County Attorney
Ravalli County
Hamilton, MT 59840

MR. V. G. KOCH
County Attorney
Richland County
Sidney, MT 59270

MR. JAMES McCANN
County Attorney
Roosevelt County
Wolf Point, MT 59201

MR. JOHN FORSYTHE
County Attorney
Rosebud County
Forsyth, MT 59327

MR. TED COWAN
County Attorney
Sanders County
Thompson Falls, MT 59873

MR. TOM DARLAND
County Attorney
Sheridan County
Plentywood, MT 59254

MR. JOHN G. WINSTON
County Attorney
Silver Bow County
Butte, MT 59701

MR. ED LAWS
County Attorney
Stillwater County
Columbus, MT 59019

MR. CONRAD B. FREDRICKS
County Attorney
Sweet Grass County
Big Timber, MT 59011

MR. LARRY JUELFS
County Attorney
Teton County
Choteau, MT 59422

MR. RAE KALBFLEISCH
County Attorney
Toole County
Shelby, MT 59474

MR. J. B. WHEATCROFT
County Attorney
Treasure County
Hysham, MT 59038

MR. GORDON WHITE
County Attorney
Valley County
Glasgow, MT 59230

MR. DAVID BARNHILL
County Attorney
Wheatland County
Harlowton, MT 59036

MR. RONALD S. EFTA
County Attorney
Wibaux County
Wibaux, MT 59353

MR. HAROLD HANSER
County Attorney
Yellowstone County
Billings, MT 59101